IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 10-0094

IN RE PARENTING OF	)
	)
A.L.S.,	)
	)
A Minor Child,	)
	)
TOBIN NOVASIO,	)
	)
Petitioner and Appellee,	)
	)
and	)
	)
TARA SYLVESTER,	)
	)
Respondent and Appellant.	)

ON APPEAL FROM THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF YELLOWSTONE HONORABLE G. TODD BAUGH

BRIEF OF APPELLANT

APPEARANCES:

LINDA L. HARRIS
HARRIS LAW FIRM, P.C.
2722 THIRD AVE NORTH
GW BUILDING / SUITE 250
BILLINGS MT 59101-1996
(406) 259-4402
Attorney for Appellant

PATRICK C. SWEENEY
PATRICK C. SWEENEY, P.C.
2817 SECOND AVE NORTH
SUITE 200
BILLINGS MT 59101
(406) 245-2439
Attorney for Appellee

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1. Did the District Court err by entering a Judgment without entering Findings of Fact regarding the best interests of the parties' child within the criteria established by Section 40-4-212, M.C.A.?

2. Did the District Court abuse its discretion by failing to follow the parenting recommendations of Investigator Tylene Merkel without finding that the same were not in the best interests of the parties' child?

STATEMENT OF THE CASE

By Petition for Establishment of Permanent Parenting Plan, dated November 28, 2006, Petitioner-Appellee, Tobin Novasio (hereinafter Tobin) filed a petition against Respondent-Appellant, Tara Sylvester (hereinafter Tara), seeking, among other relief, a parenting plan for the minor child in this action. The parties have one (1) child, A.L.S., age 3 years.

After trial on October 7, October 18 and November 17, 2009, the Court issued a Decision and Order on January 22, 2010. The Court ordered the following parenting schedule:

a) Alternating 4 days periods of time as of March 1, 2010;

b) 5 days alternating periods of time by no later than April 1, 2011;

c) Alternating weeks shall begin in September 2012.

Notice of Entry of Judgment was filed by Tobin's counsel dated January 28, 2010. Tara's Notice of Appeal was filed on or about February 26, 2010. The Court entered a Final Parenting Plan on March 2, 2010.

No Findings of Fact or Conclusions of Law were entered by the Court and there is no indication in the District Court's Decision and Order and Final Parenting Plan that the reports and recommendations of Tylene Merkel were considered.

STATEMENT OF FACTS

By Order for Court Appointed Investigation dated March 20, 2007, the District Court ordered a parenting evaluation by Tylene Merkel based upon the Motion to Appoint Court Investigator filed on behalf of Tobin and dated February 1, 2007.

Tobin sought an Interim Parenting Plan and a hearing regarding the same was held on May 8, 2007 and May 9, 2007. The District Court entered an interim parenting plan on the record granting Tobin alternating weekend parenting (Transcript / May 9, 2007 / page 115 at lines 5 - 9).

Ms. Merkel's initial report was submitted to the Court and counsel on or about January 18, 2008. Ms. Merkel recommended parenting time for Tobin "from Thursday at 3 PM to Sunday at 3 PM" the 1st and 3rd weekend of the month with Tobin having additional parenting time when the child reached the age of 3 years.

By Motion for Hearing on Parenting Plan dated December 18, 2008, Tobin requested Ms. Merkel "produce a addendum to her report updating it in view of the change of circumstances". By Order Setting Hearing on Motion to Modify Interim Parenting Plan and Updated Parenting Plan Recommendation dated December 28, 2008, Ms. Merkel was "directed to provide the parties and the Court

with a addendum to her report updating her recommendations after suitable payment arrangements are in place".

Ms. Merkel's recommendations dated "April 2009" were provided to counsel on May 17, 2009. Ms. Merkel's recommendations do not include equal parenting, although it provides Tobin with parenting time in addition to that previously enjoyed by him.

SUMMARY OF ARGUMENT

1. Did the District Court err by entering a Decision and Order without entering Findings of Fact regarding the best interests of the parties' child within the criteria established by **Section 40-4-212, M.C.A.**?

The Court issued no Findings of Fact or Conclusions of Law in support of the Court's Decision and Order. As a result, the basis of the Court's Decision and Order can not be determined and the weight, if any, given to the criteria established in **Section 40-4-212, M.C.A.** can not be determined. **Section 40-4-212, M.C.A.** establishes the "best interests" test for a determination of parenting.

2. Did the District Court abuse its discretion by failing to consider the parenting recommendations of Investigator Tylene Merkel without finding that the same were not in the best interests of the parties' child?

Tylene Merkel, as ordered by the District Court, submitted two reports regarding her findings and the best interests of the minor child of the parties. The District Court's Decision and Order does not mention or acknowledge Ms. Merkel's reports and recommendations and did not find that Ms. Merkel's recommendations, based on the evidence at hearing, are not in the best interests of the parties' child.

ARGUMENT

1. Did the District Court err by entering a Judgment without entering Findings of Fact regarding the best interests of the parties' child within the criteria established by **Section 40-4-212, M.C.A.**?

The standard of review in a child custody case is whether the findings of the district court are clearly erroneous. The district court's decision will be upheld unless a clear abuse of discretion is shown. **In re Marriage of Susen (1990), 242 Mont. 10, 13-14, 788 P.2d 332, 334.**

Section 40-4-212, M.C.A. provides the following:

> Best interest of child. (1) The court shall determine the parenting plan in accordance with the best interest of the child. The court shall consider all relevant parenting factors, which may include but are not limited to:
>
> (a) the wishes of the child's parent or parents;
>
> (b) the wishes of the child;
>
> (c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interest;
>
> (d) the child's adjustment to home, school, and community;
>
> (e) the mental and physical health of all individuals involved;
>
> (f) physical abuse or threat of physical abuse by one parent against the other parent or the child;

(g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent;

(h) continuity and stability of care;

(i) developmental needs of the child;

(j) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay, which is considered to be not in the child's best interests;

(k) whether a parent has knowingly failed to financially support a child that the parent is able to support, which is considered to be not in the child's best interests;

(l) whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests. In making that determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in that parent's household has been convicted of any of the crimes enumerated in 40-4-219(8)(b).

(m) adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions.

* * *

This Court held in the case of **In re the Marriage of Keating, 212 Mont. 462, 689 P.2d 249 (1984),** as follows:

> Regarding the statutory requirement that certain factors be considered in all child custody determinations, this Court recently stated:
>
> "The District Court need not make specific findings on each of the elements. Speer v. Speer (Mont. 1982), [201 Mont. 418,] 654 P.2d 1001, 1003, 39 St. Rep. 2204, 2206. However, the `essential and determining facts upon which the District Court rested its conclusion' must be expressed. Cameron v. Cameron (1982), 197 Mont. 226, 231, 641 P.2d 1057, 1060." Hardy v. Hans (Mont. 1984), [212 Mont. 25,] 685 P.2d 372, 374, 41 St. Rep. 1566, 1569.
>
> In Hardy, the trial court failed to make specific findings of fact, but reflected, in a court memorandum, statements the child had made to the court regarding his interaction with family and friends and his adjustment in both communities and schools. This Court concluded that the parents' wishes were obvious and that the child's statements, contained in the court's memorandum, were sufficient to satisfy the statutory requirement that the trial court consider the child's wishes, his adjustment in the community and in school, and his interaction with family and others who may significantly affect his best interest.
>
> Hardy is distinguishable from this case in that here there are no findings or other indications by the court that it considered each of the factors set forth in Section 40-4-212, MCA. Absent an indication that the trial court considered all of the statutorily mandated factors, the award of custody cannot be upheld.
>
> The extensive record in this case contains substantial evidence

on each of the five factors of which consideration was required. We remand the cause to the District Court for appropriate findings, a determination pursuant to Section 40-4-212, MCA, and such other proceedings, if any, that the court may deem necessary.

This Court held in the case of **In re the Marriage of Converse, 252 Mont. 67, 826 P.2d 937 (1992),** as follows:

> When reviewing custody issues this Court must first determine if the factors set out in § 40-4-212, MCA, were considered by the district court. In re Marriage of Jacobson (1987), 228 Mont. 458, 743 P.2d 1025. While it is encouraged, the trial court need not make specific findings on each of the factors. However, failure by the trial court to at least consider all of the statutorily mandated factors is error. In re Marriage of Speer (1982), 201 Mont. 418, 654 P.2d 1001. The custody determination must be based on substantial evidence relating to the statutory factors and must be set forth explicitly in the findings. In re Marriage of J.J.C. and P.R.C. (1987), 227 Mont. 264, 739 P.2d 465. The findings should, at a minimum, set forth the "essential and determining facts upon which the District Court rested its conclusion on the custody issue." In re Marriage of Cameron (1982), 197 Mont. 226, 231, 641 P.2d 1057, 1060 (quoting In re Marriage of Barron (1978), 171 Mont. 161, 580 P.2d 936). This Court has refused to uphold an award of custody when the district court's findings indicated that not all of the statutory factors had been considered, even though the extensive record in the case indicated that the district court had received substantial evidence on each of the factors. In re Marriage of Keating (1984), 212 Mont. 462, 689 P.2d 249.

The District Court entered no Findings of Fact and Conclusions of Law indicating that the best interests criteria was considered in the District Court's

Decision and Order. As a result, the basis of the District Court's decision can not be determined. Entry of the Final Parenting Plan is not supported by Findings of Fact and Conclusions of Law. Until the District Court addresses a best interests determination based on the evidence present at trial, entry of a Final Parenting Plan is not supported by the record.

2. Did the District Court abuse its discretion by failing to consider the parenting recommendations of Investigator Tylene Merkel without finding that the same were not in the best interests of the parties' child?

This Court held in the case of **In re the Marriage of Keating, 212 Mont. 462, 689 P.2d 249 (1984),** as follows:

> In Bloom-Higham, the district court ordered an investigation and report concerning custodial arrangements for the child pursuant to § 40-4-215, MCA, but did not indicate any consideration of the report in reaching its final custody decision. We found the court's failure to consider the report an abuse of discretion. Bloom-Higham, 227 Mont. at 220, 738 P.2d at 115-116. Maxwell

This Court held in the case of **In re the Marriage of Moseman, 253 Mont. 28, 830 P.2d 1304 (1992),** as follows:

> As a general rule, the district court is not required to make a specific finding as to each item of evidence, but only of the essential and determining factors upon which the court's conclusions rest. In re Marriage of Keating (1984), 212 Mont. 462, 689 P.2d 249. However, Ziegler and its progeny require that a specific finding of fact is

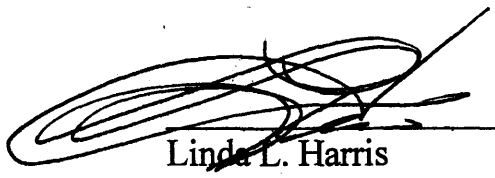
> required regarding a custody investigation ordered by the court. The District Court is not bound by the investigation; however, we are not able to determine if the District Court even considered the report. Therefore, we conclude that the matter must be remanded to the District Court to make a finding that the Court Services investigation was considered.

The District Court's Decision and Order and Final Parenting Plan in this action do not indicate that the reports submitted by Tylene Merkel were considered. As a result, this matter must be remanded to the District Court for a finding that Ms. Merkel's reports were considered in the District Court's determination of a parenting plan for the parties' child.

CONCLUSION

This case should be remanded to the District Court for entry of Findings of Fact and Conclusions of Law based on best interests of the minor child of the parties. The District Court should, upon remand, make Findings of Fact regarding the District Court's consideration of the parenting reports submitted by Ms. Merkel and the extent to which such reports were considered by the District Court in making the parenting determination.

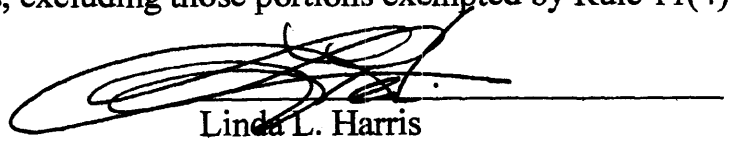
Respectfully submitted this 13th day of August, 2010.



Linda L. Harris
Harris Law Firm, P.C.
2722 Third Avenue North, Suite 250
Billings, MT 59101-1996
(406) 259-4402
Attorney for Respondent and Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is proportionally spaced, and printed in Times New Roman 14 point font. The brief is double spaced, except for quoted material and footnotes. It does not exceed 10,000 words, excluding those portions exempted by Rule 11(4).



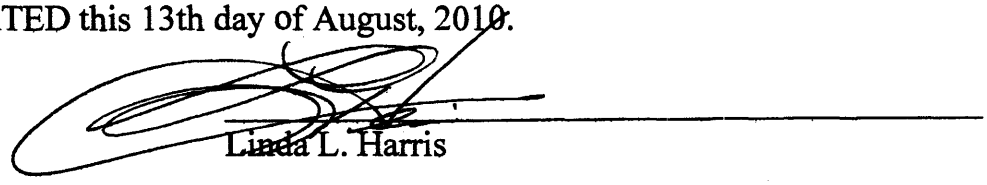
Linda L. Harris

CERTIFICATE OF SERVICE

I certify that on August 13, 2010, a true and correct copy of the foregoing Brief of Respondent-Appellant, was served by first class mail on the following counsel of record for Petitioner-Appellee:

PATRICK C. SWEENEY
PATRICK C. SWEENEY, P.C.
2817 2ND AVENUE NORTH, SUITE 205
BILLINGS MT 59101

DATED this 13th day of August, 2010.



Linda L. Harris

Appendix:

Decision and Order	January 22, 2010
Final Parenting Plan	March 2, 2010